Supreme Court, U.S.
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IN THE OFFICE OF THE CLERK

Supreme Court of the United States

WEINSTEIN, EISEN & WEISS LLP,

Petitioner,

v.

DAVID A. GILL, CHAPTER 11 TRUSTEE;
COMERICA BANK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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I.

QUESTIONS PRESENTED

There is a sharp split in the circuits about the use — and misuse — of the statutory mootness provision in 11 U.S.C. § 364(e). In this case, § 364(e) was used to shield from appellate review an agreement between a bankruptcy trustee and a bank to facilitate the payment of hundreds of thousands of dollars to the trustee and his selected professionals, to the exclusion of other equally ranked claimants who are otherwise entitled to share-and-share-alike under the Bankruptcy Code. In negotiating funding for a bankruptcy estate, the bank and the trustee grafted onto the financing contract (and the related order) a provision saying that certain administrative expenses of the bankruptcy estate allowable under § 503(b)[1] could be paid with loan funds or asset sale proceeds, while others could not, notwithstanding the fact that such loan funds and asset proceeds were property of the estate, such claims were of equal rank and could not be discriminated against *inter se* under the Bankruptcy Code, and no other money would be available to pay the excluded claims. The circuits are sharply split on whether such a provision escapes scrutiny merely because it was included in an unstayed financing order.

1. Does absence of a stay pending appeal of a bankruptcy financing order necessarily require an outright dismissal for mootness, or does the absence of a stay merely limit the relief available on appeal? Is mootness negated if relief can be fashioned without upsetting the validity of the post-petition debt or the priority of security granted to secure it?

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1. All statutory references are to the Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.*, unless otherwise indicated.

2. Where mootness applies, does it extend to (and hence extinguish appeals about) *any* clause included in a bankruptcy financing order? Or does mootness extend only to terms actually about financing that are governed by or authorized under 11 U.S.C. § 364?

II.

PARTIES TO PROCEEDING

Petitioner is the law firm of Weinstein, Eisen & Weiss LLP. Petitioner is an administrative creditor of the bankruptcy estate of Cooper Commons LLC (the "Petitioner").

Respondents are David A. Gill, Chapter 11 Trustee for the bankruptcy estate of Cooper Commons, LLC ("Gill" or the "Trustee") and Comerica Bank, Successor By Merger To Comerica Bank-California ("Comerica" and, together with Gill, the "Respondents").

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I.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Weinstein, Eisen & Weiss LLP ("WEW" or the "Petitioner") respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit that dismissed its appeal as entirely moot under 11 U.S.C. § 364(e).

II.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit was initially reported as *Weinstein, Eisen & Weiss LLP v. Gill (In re Cooper Commons)*, 424 F.3d 963 (9th Cir. 2005). [Appendix: B]. In an *Order and Amended Opinion* issued *sua sponte* on December 7, 2005 (the "Amended Opinion"), the Ninth Circuit withdrew its first Opinion and superceded it with the Amended Opinion. [Appendix: A].

III.

BASIS FOR JURISDICTION IN THIS COURT

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 13, 2005. [Appendix: B]. On December 12, 2005, within 90 days of the entry of the Ninth Circuit's judgment, Petitioner Weinstein, Eisen & Weiss LLP ("Petitioner" or "WEW") filed this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

IV.

STATUTORY PROVISIONS INVOKED

The following statutes are involved in this case:

11 U.S.C. § 364(d) (in pertinent part):

> (1) The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if —
>
> (A) the trustee is unable to obtain such credit otherwise; and
>
> (B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

11 U.S.C. § 364(e):

> The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such